Copyright © 2005 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

35 ELR 10108 2-2005

ELR
NEWS & ANALYSIS

"Fairness and Justice" Ought to Guide the Courts When Reviewing Legislative Determinations of "Public Use"

by Joel R. Burcat and Elizabeth U. Witmer

On September 28, 2004, the U.S. Supreme Court granted certiorari to review a case that has vast importance for land developers, private property owners, governments, redevelopment agencies, and others who are impacted by governmental redevelopment efforts: *Kelo v. City of New London*.[1]

No one doubts that the government has the power to take private property for public use so long as the government pays a property owner "just compensation" for that property.[2] The Fifth Amendment to the U.S. Constitution explicitly provides "nor shall private property be taken for *public use*, without just compensation."[3] This means that the government may condemn private property for a public use, such as a highway or public park, so long as the landowner is paid just compensation.[4]

Since the Court's 1954 decision in *Berman v. Parker*,[5] however, government and quasi-governmental agencies, such as private development corporations, have been permitted to take private property and pay just compensation, but then have redistributed that property to other private parties who redeveloped the property. The ability of governmental agencies to continue this practice has been called into question by the Court's decision to review the Connecticut Supreme Court's decision in *Kelo*. A decision in *Kelo* that does anything other than affirm the Connecticut Supreme Court will modify the way government has done business in the redevelopment area and have an impact on property owners, land developers, land redevelopers, and governmental units.

The time has come for the Court to reevaluate the extreme deference allowed by it in *Berman* of the legislature's "public use" determinations. This Article urges that the Court utilize the "fairness and justice" standard that it has held applies to cases under the Takings Clause and permit a reasonable judicial review of a legislature's determination of a "public use" when land has been condemned for redevelopment purposes.[6]

Factual Background

In *Kelo*, New London, Connecticut, and the New London Development Corporation commenced condemnation proceedings against property owners consistent with a plan to redevelop their property.[7] The city's plan was to tear down the plaintiffs' homes and to turn the land over to a private developer who would implement a master plan for the site. The trial court granted to some of the plaintiffs (those in parcel 4A, see below) the relief they were seeking by issuing a permanent injunction preventing the condemnation.[8] The trial court, however, refused to issue a permanent injunction to other plaintiffs (those in parcel 3) in the case.[9]

Signaling how it was about to rule, the Connecticut Supreme Court, in the opening sentence of its lengthy ruling, framed the issue as follows:

> The principal issue in this appeal is whether the public use clauses of the federal and state constitutions authorize the exercise of the eminent domain power in furtherance of a significant economic development plan that is projected to create in excess of 1000 jobs, to increase tax and other revenues, and to revitalize an eco-

Mr. Burcat is a Partner with Saul Ewing L.L.P. in its Harrisburg, Pennsylvania, office and is Chair of the firm's Environmental Department. Ms. Witmer is a Partner with Saul Ewing L.L.P. in its Chesterbrook, Pennsylvania, office. This Article is for informational purposes only. Nothing herein is intended or should be construed as legal advice or a legal opinion applicable to any particular set of facts or to any individual's or entity's general or specific circumstances. The opinions expressed in this Article are the authors' and should not be attributed to any of the authors' or the firm's clients. For more information, visit www.RegulatoryTaking.com.

1. 268 Conn. 1, 843 A.2d 500 (2004), *cert. granted*, No. 04-108.
2. Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893):

> The legislature may determine what private property is needed for public purposes; that is a question of a political and legislative character. But when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

3. U.S. Const. amend. V (emphasis added).
4. *See, e.g.*, Joel R. Burcat & Julia M. Glencer, *The Law of Regulatory Takings: Development of the Law*, Construction L. & Bus., Mar. 2002, at 7-18.
5. 348 U.S. 26 (1954).
6. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 336, 32 ELR 20627 (2002); *see* Palazzolo v. Rhode Island, 533 U.S. 606, 636, 32 ELR 20516 (2001) (O'Connor, J., concurring); *see also* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123-24, 8 ELR 20528 (1978); Armstrong v. United States, 364 U.S. 40, 49 (1960).
7. 268 Conn. at 1, 843 A.2d at 500.
8. *Id.* at 5, 843 A.2d at 508.
9. *Id.*

Copyright © 2005 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

> nomically distressed city, including its downtown and waterfront areas.[10]

Simply stated, the Connecticut Supreme Court affirmed the trial court in its rulings against the property owners and reversed the trial court in its rulings in favor of the property owners and against the city and development corporation.[11]

The *Kelo* court identified New London as a city that Connecticut has designated as a "distressed municipality." To help reverse this situation, the state and city had accommodated Pfizer, Inc. in its effort to construct a "global research facility" in the area adjacent to the Fort Trumbull section of New London. Pfizer opened its facility in June 2001. The city and the development corporation, a private urban redevelopment company established by the city, planned a major redevelopment of the Fort Trumbull section. The land needed for this redevelopment required 90 acres and is comprised of 115 land parcels. The development plan calls for the construction of a new state park, a waterfront hotel and conference center, a "major" health club facility, marinas, 80 new residences, the U.S. Coast Guard Museum, a high technology research and development park, and significant office and retail space. The plan further called for the development corporation to own the land located within the development area. Private developers would lease the land from the development corporation and be required to comply with the plan. At least one developer was identified who would lease three of the parcels, develop them, and market the new development to tenants.[12]

The development corporation estimated that if its plan were fully implemented, it was expected to generate between 518 and 867 construction jobs, 718 and 1,362 direct jobs, and 500 and 940 indirect jobs.[13] When fully implemented, the plan would generate between $680,544 and $1,249,843 in property tax revenue, annually, for the city.[14] The court noted that all of this benefit would occur in a city that recently experienced a loss of nearly 2,000 jobs and other deterioration.

After the city's and the development corporation's approval of the plan, many landowners willingly sold their property to the development corporation. Others—the plaintiffs in this case—refused to sell their properties and eminent domain proceedings were commenced against them. Four parcels owned by three of the plaintiffs were located in an area designated for the high technology and development office space (parcel 3). Eleven properties owned by four of the plaintiffs were located in an area designated to support the new state park, which might also include parking or retail space (parcel 4A). All of these properties included the personal residences of the property owners and properties that were leased for residential purposes. The plaintiffs sought an injunction stopping the eminent domain proceedings. The trial court upheld the eminent domain taking against the owners in parcel 3 and dismissed the pending eminent domain proceedings against the plaintiffs in parcel 4A.

The plaintiffs appealed the refusal of the trial court to grant the preliminary injunction for parcel 3, and the defendants cross-appealed the preliminary injunction issued for parcel 4A. The plaintiffs contended that condemnation of property for economic development by private parties was inconsistent with both the Connecticut Supreme Court's prior decisions and the Constitution.[15] In particular, the plaintiffs argued that the new owner would not provide a public service or utility and the condemnation will not remove blight conditions that are, in and of themselves, harmful to the public. The court concluded, however, that "economic development projects created and implemented pursuant to [the Connecticut statute authorizing development corporations to condemn private property] that have the public economic benefits of creating new jobs, increasing tax and other revenues, and contributing to urban revitalization, satisfy the public use clauses of the state and federal constitutions."[16]

What Constitutes a Public Use?

The court's analysis began by reference to *Olmstead v. Camp*,[17] a Connecticut case from 1866, in which it held that a private, water-powered mill could be permitted to condemn its neighbor's land to allow for flooding of the neighbor's land (so long as just compensation was provided) as such activity constituted "public use."

> "Public use" may therefore well mean public usefulness, utility or advantage, or what is productive of general benefit; so that any appropriating of private property by the state under its right of eminent domain for purposes of great advantage to the community is a taking for public use.[18]

The court also looked to *Olmstead* for another important principle of Connecticut law, namely that "[t]he [legislative] power [of declarations of public use] *requires a degree of elasticity to be capable of meeting new conditions and improvements and the ever increasing necessities of society.*"[19]

Jumping ahead more than a century, the court then looked to an early redevelopment case in which it had held that "there can be no doubt that the elimination of such substandard, insanitary [sic], deteriorated, slum or blighted areas . . . is for the public welfare. Private property taken for the purpose of eradicating the conditions which obtain in such areas is taken for a public use."[20] The court went on to quote from *Gohld Realty Co. v. Hartford*[21] that the "*same public use continues after the property is transferred to private persons*."[22] The court quoted a more recent case allowing government to take private property and turn that over to another private landowner for redevelopment, noting that its test of a public use had broadened over time and that the "modern trend" is to expand and liberally construe the meaning of public purpose: "The test of public use is not

10. *Id.* at 5, 843 A.2d at 507.
11. *Id.* at 6, 843 A.2d at 508.
12. *Id.* at 9, 843 A.2d at 510.
13. *Id.* at 10, 843 A.2d at 510.
14. *Id.*
15. *Id.* at 26, 843 A.2d at 519.
16. *Id.* at 26-27, 843 A.2d at 519.
17. 33 Conn. 532 (1866).
18. *Kelo*, 268 Conn. at 30-31, 843 A.2d at 522 (quoting *Olmstead*, 33 Conn. at 546).
19. *Id.* at 32, 843 A.2d at 523 (quoting *Olmstead*, 33 Conn. at 551 (emphasis in *Kelo*)).
20. *Id.* at 33, 843 A.2d at 524 (quoting Gohld Realty Co. v. Hartford, 141 Conn. 135, 143, 104 A.2d 365 (1954)).
21. 141 Conn. 135, 104 A.2d 365 (1954).
22. *Kelo*, 268 Conn. at 33, 843 A.2d at 524 (emphasis in *Kelo*).

Copyright © 2005 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

how the use is furnished but rather the right of the public to receive and enjoy the benefit."[23]

The *Kelo* court then relied on *Berman*[24] and *Hawaii Housing Authority v. Midkiff*,[25] the leading Court cases on the question of "public use." *Berman* was the first Court case to recognize the power of the federal government to take private property for redevelopment that would be carried out by other private owners. The *Berman* Court allowed the government, pursuant to a federal law that was designed to eliminate blighted property in the District of Columbia, to take a department store that was not blighted so that the property could be redeveloped. The *Kelo* court focused on the Court's holding that, "[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."[26] The *Berman* Court expressed the view that it was the legislature's role to determine the public interest, even in eminent domain actions, and that "the role of the judiciary in determining whether that power is being exercised for a public purpose is an *extremely narrow* one."[27] The *Kelo* court characterized the *Berman* Court's approach as "highly deferential" to agency determination.[28] Quoting again from *Berman*, the court noted that the Supreme Court concluded by finding that "[t]he rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking."[29]

The *Kelo* court then quoted from a more recent Court pronouncement in which the legislature of Hawaii sought to correct a complicated property rights situation that had existed since the original inhabitation of Hawaii. To correct the existing property ownership situation, the legislature of the state of Hawaii proposed to rearrange the property rights of individuals via a complicated land transfer scheme.[30] The Court upheld the land transfer arrangement largely on the basis of the Hawaii Legislature's determination of public use. The *Kelo* court quoted the Court's statement of deference to the legislature:

> *In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use unless the use be palpably without reasonable foundation* . . . . Thus, *if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use*.[31]

The court then stated that it was obligated to defer to the legislative authority where a legislative authority had "rationally" determined that the economic development "constitutes a valid public use for the exercise of the eminent domain power."[32]

Can Economic Development Be a Public Use?

The plaintiffs argued that economic development in and of itself cannot be a public use that justifies the use of eminent domain. The court rejected this argument.[33] The plaintiffs' argument was that the primary legislative purpose was to transfer the property to private entities, which were the primary beneficiaries of the taking, thus, the benefit to the public was secondary. The plaintiffs contrasted this scenario with the blight cases in which the primary benefit was to the public with any benefit to private entities being secondary.[34] The court rejected this argument reminding that "municipal economic development can be, in and of itself, a constitutionally valid public use under the well established broad, purposive approach that we take on this issue under both the federal and state constitutions."[35] Any private benefit was identified by the court as secondary to the public benefit, just as in the blight cases.

Court Rejects Plaintiffs' Argument That the Effect of the Condemnation Benefitted Private Entities

Plaintiffs also argued that, assuming the economic development was a valid public use, these particular condemnations did not serve a public use as the effect was to benefit private entities, namely the development corporation, the private developer, and Pfizer.[36] The court held that the mere subsequent transfer of the land to private entities, especially when successful achievement of the public purpose of economic development requires private sector involvement, did not defeat the public purpose.[37] The court analyzed a distinction drawn by the trial court that much of the development would only indirectly benefit Pfizer (although it was acknowledged that at least some of it would directly benefit Pfizer). Thus, because there was, at most, "tangential[ ] benefit" to Pfizer, the "distressed city," not Pfizer, was the primary beneficiary.[38] Relying on Connecticut precedent, the court held that "[w]here the public use which justifies the taking of the area in the first instance exists . . . that same public purpose continues even though the property is later transferred to private persons."[39]

In this context, the plaintiffs argued that a ruling against them would form a pretext by government to allow private parties, through friendly governmental entities, to allow the condemnation of low-tax generating homes to be replaced by businesses that would generate greater tax revenues. The plaintiffs argued that "[a]ny home will be up for grabs to any private business that wants the property."[40] The court took the opportunity to warn governments against unreasonable or non-public use takings:

> [A]n exercise of the eminent domain power is unreasonable, in violation of the public use clause, if the facts and circumstances of the particular case reveal that the taking specifically is intended to benefit a private party.

23. *Id*. at 35, 843 A.2d at 525 (quoting Katz v. Brandon, 156 Conn. 521, 532-33, 245 A.2d 579 (1968)).
24. 348 U.S. at 26.
25. 467 U.S. 229, 14 ELR 20549 (1984).
26. *Kelo*, 268 Conn. at 36, 843 A.2d at 525 (quoting *Berman*, 348 U.S. at 32).
27. *Id.* (emphasis in original).
28. *Id*. at 37, 843 A.2d at 526 (quoting *Berman*, 348 U.S. at 33-34).
29. *Id.*
30. *Midkiff*, 467 U.S. at 229.
31. *Kelo*, 268 Conn. at 39-40, 843 A.2d at 527 (quoting *Midkiff*, 467 U.S. at 241, 244 (emphasis in *Kelo*)).
32. *Id*. at 40, 843 A.2d at 528.
33. *Id.* at 46, 843 A.2d at 531.
34. *Id.* at 46-47, 843 A.2d at 531-32.
35. *Id.*
36. *Id.* at 55, 843 A.2d at 536-37.
37. *Id.* at 55-56, 843 A.2d at 537.
38. *Id.* at 60, 843 A.2d at 540.
39. *Id.* at 62, 843 A.2d at 541.
40. *Id.* at 66, 843 A.2d at 543.

Copyright © 2005 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

> Thus, we emphasize that our decision is not a license for the unchecked use of the eminent domain power as a tax revenue raising measure; rather, our holding is that rationally considered municipal economic development projects such as the development plan in the present case pass constitutional muster.[41]

The court examined the specific circumstances surrounding the taking of the properties in parcels 3 and 4A. It concluded that the record supported the taking of the properties for a "public use" and that the property owners could not block the exercise of eminent domain.

Dissent

The dissent (in a 4 to 3 decision), authored by Justice Peter T. Zarella, exhaustively examined the law relating to eminent domain and public use. The dissent acknowledged that the requirement of "judicial deference to determinations of public use by state legislatures is appropriate."[42] Nevertheless, the dissent stated that "judicial deference to legislative declarations of public use does not require complete abdication of judicial responsibility."[43] The dissent urged that "the taking of nonblighted property in a blighted area is subject to additional scrutiny to determine whether the taking is 'essential' to the redevelopment plan."[44] Furthermore, "a heightened standard of judicial review [should] be required to ensure that the constitutional rights of private property owners are protected adequately when property is taken for private economic development[ ]."[45] The dissent stated that the record was lacking in support of the taking of the plaintiffs' properties and would have held the takings unconstitutional.[46]

Court Grants Petition for Certiorari

The plaintiffs filed a petition for certiorari and on September 28, 2004, the Court granted the petition. The single question that has been accepted for review by the Court is:

> What protection does the Fifth Amendment public use requirement provide for individuals whose property is being condemned, not to eliminate slums or blight, but for the sole purpose of "economic development" that will perhaps increase tax revenues and improve local economy?[47]

Discussion

The most significant Court cases on "public use" are *Berman*, *Midkiff*, and *National Railroad Passenger Corp. v. Boston & Maine Corp.*[48] In the 50 years since *Berman*, the Court has deferred to the statements of the legislature regarding whether or not a particular use constitutes a public use. It is more than interesting that the Court wants to reexamine the issue again. These cases are thought to be settled law. Governments and redevelopment corporations have relied heavily on the precedent established by these cases for half a century to justify the taking of privately held land for redevelopment purposes. The mere fact that the Court is revisiting this issue raises the possibility that it will modify its earlier decisions.

While the Court has explicitly insisted that the Constitution requires the courts to determine what constitutes "just compensation,"[49] it nevertheless has deferred to the legislature as to what constitutes a "public use."[50] Thus, in the space of the few words of the Takings Clause, the Court has parsed the clause to mean that the courts are the guardians of the constitutional right to just compensation but that the constitutional determination of what constitutes a public use is for the legislature.

The Court's self-imposed dichotomy and parsing of the Takings Clause admits of no consistency. Nothing in the clause indicates why one determination is almost exclusively for the courts yet the other is almost exclusively for the legislature. Commentators from both ends of the political spectrum have had a field day due to the inconsistency that is apparent from this dual system of review.[51] While it is entirely consistent with the jurisprudence of the Court for courts to be designated as the arbiter in the question of the constitutionality of just compensation, it is logically inconsistent for the courts to abdicate that responsibility in the question of public use.

A better way to analyze the Takings Clause is by relying on the constitutional requirement of "fairness and justice" in all takings cases. The Court has recognized in a number of takings cases (most recently in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*)[52] that "[t]he concepts of 'fairness and justice' . . . underlie the Takings Clause . . . ."[53] Although *Tahoe-Sierra* dealt with

41. *Id.* at 65-66, 843 A.2d at 543.
42. *Id.* at 134, 843 A.2d at 581 (Zarella, J., dissenting).
43. *Id.* at 134-35, 843 A.2d at 582 (Zarella, J., dissenting).
44. *Id.* at 143, 843 A.2d at 587 (Zarella, J., dissenting).
45. *Id.*
46. *Id.* at 168, 843 A.2d at 600.
47. Kelo, 268 Conn. at 1, 843 A.2d at 500.
48. 503 U.S. 407, 423 (1992).
49. Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893).
50. *Berman*, 348 U.S. at 32 (citations omitted):

> Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia or the States legislating concerning local affairs.

51. *Compare* Giddeon Kanner, *Developments in the Right-To-Take Law: Is the End of the Redevelopment Scam Coming?*, Eminent Domain and Land Valuation Litigation, ALI-ABA Course of Study Materials SG059, at 25 (Am. L. Inst. 2002):

> Thus the Courts have evolved a Catch-22 system. First they provide incentives to reckless exercise of the eminent domain power by their extreme laissez faire attitude when it comes to reviewing whether the taking is consistent with the "public use" constitutional limitation and the statutory authorization to condemn. They also assert that when it comes to fixing minimal standards of "just compensation," they are supreme.

with Ralph Nader & Alan Hirsch, *Making Eminent Domain Humane*, 49 Vill. L. Rev. 207, 208 (2004) (footnotes omitted) ("The courts have come to interpret the 'public use' requirement in a way that renders it meaningless, essentially giving governments carte blanche to take property for any reason whatsoever, including crass political purposes or speculative, transient economic purposes.").

52. 535 U.S. 302, 32 ELR 20627 (2002).
53. *Id.* at 336; *see* Palazzolo v. Rhode Island, 533 U.S. 606, 636, 32 ELR 20516 (2001) (O'Connor, J., concurring); *see also* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123-24, 8 ELR 20528 (1978); Armstrong v. United States, 364 U.S. 40, 49 (1960).

Copyright © 2005 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

another aspect of the Takings Clause, namely a regulatory taking, that does not diminish the principle stated by the Court that the concepts of fairness and justice underlie the Takings Clause. Indeed, it is axiomatic that the concepts of fairness and justice should govern all aspects of review of all claims under the Takings Clause. Certainly nothing in the Takings Clause or in the Court's jurisprudence would suggest that "fairness and justice" ought to apply in some cases under the Takings Clause, yet some other standard should underlie other cases under the same clause.

As the Court identified in *Penn Central Transportation Co. v. New York City*,[54] "this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[55] The Court ruled that in making a determination of "whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely upon the particular circumstances [in that] case."[56] The Court recognized that the determination that must be made is an "essentially ad hoc, factual inquir[y]."[57] With respect to regulatory takings, the Court recently has endorsed the requirement of "'essentially ad hoc, factual inquiries,' designed to allow 'careful examination and weighing of all the relevant circumstances.'"[58] Thus, "fairness and justice" is one way of stating that the courts must review the actions of legislative bodies when they act under the Takings Clause. If the courts do not have this role, then the Court's repeated references to "fairness and justice" is nothing more than a platitude.

While the Court in *Tahoe-Sierra* acknowledged significant differences between condemnations and physical takings (with respect to which the Court stated that its jurisprudence was "as old as the Republic") and regulatory takings,[59] once again, nothing in the Takings Clause admits to anything less than the "fairness and justice" standard for review of all cases under the clause.

One area of the Court's jurisprudence in condemnations cases that is not "as old as the Republic" is the question of the level of review of a legislative "public use" determination under the Takings Clause. Fifty years ago, in *Berman*, the Court set out a new standard of almost complete deference to the legislature in which the legislative determination of "public use" is "well-nigh conclusive."[60] In such cases, "[t]he role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one."[61] Subsequently, the Court further elucidated the role of the courts in reviewing "public use" determinations:

> There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But the Court in *Berman* made clear that it is "an extremely narrow" one. The Court in *Berman* cited with approval the Court's decision in *Old Dominion Co. v. United States*, which held that deference to the legislature's "public use" determination is required "until it is shown to involve an impossibility." The *Berman* Court also cited to *United States ex rel. TVA v. Welch*, which emphasized that "[a]ny departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields." In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use "unless the use be palpably without reasonable foundation."[62]

The Court has recognized that the courts play a limited role in determining whether a legislature has properly determined that a use is consistent with the Constitution. That role is limited to a determination of whether the taking "is rationally related to a conceivable public purpose."[63] In a post-*Berman* condemnation case, *National Railroad*, the Court has asserted that the condemnation power is constitutional "as long as the condemning authorities were rational in their positions that some public purpose was served."[64] In *National Railroad*, the Court examined a statutory condemnation scheme that transferred 48.8 miles of tract from one privately owned railroad company to another. The Court made a superficial examination (that is to say, it did not make "a specific factual determination")[65] of whether the Interstate Commerce Commission was "irrational" in determining that the condemnation at issue would serve a public purpose and determined that it did serve a public purpose. On that basis, the Court held that this cursory review "suffices to satisfy the Constitution, and we need not make a specific factual determination whether the condemnation will accomplish its objectives."[66]

In a regulatory takings case, a plurality of the Court directly equated the fairness and justice requirement as requiring a review, presumably by a court, of governmental action:

> Government regulation often "curtails some potential for the use or economic exploitation of private property," and "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense." In light of that understanding, the process for evaluating a regulation's constitutionality involves an examination of the "justice and fairness" of the governmental action. That inquiry, by its nature, does not lend itself to any set formula, and the determination "whether 'justice and fairness' require that economic injuries cased by public action [must] be compensated by the government, rather than remain disproportionately concentrated on a few persons," is essentially ad hoc and fact intensive.[67]

54. 438 U.S. 104, 8 ELR 20528 (1978).
55. *Id.* at 124.
56. *Id.* (citations omitted).
57. *Id.*
58. *Tahoe-Sierra*, 535 U.S. at 322 (quoting *Penn Central*, 438 U.S. at 124, and *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring)).
59. *Tahoe-Sierra*, 535 U.S. at 322.
60. *Berman*, 348 U.S. at 32.
61. *Id.*
62. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240-42, 14 ELR 20549 (1984) (citations omitted).
63. *Id.* at 240-41.
64. *National Railroad*, 503 U.S. at 423.
65. *Id.* at 422-23.
66. *Id.*
67. Eastern Enters. v. Apfel, 524 U.S. 498, 523 (1998) (citations omitted) (per O'Connor, J.).

Copyright © 2005 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

In a somewhat earlier case, the Court again intimated that the courts determine when a governmental action that resulted in a take was fair and just:

> The Takings Clause, therefore, preserves governmental power to regulate, subject only to the dictates of "'justice and fairness.'" *Penn Central* [Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124, 8 ELR 20528 (1978)]; see *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962). There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate. Formulas and factors have been developed in a variety of settings. See *Penn Central, supra*, at 123-28. Resolution of each case, however, ultimately calls as much for the exercise of judgment as for the application of logic.[68]

Given the Court's repeated statements that the Takings Clause is governed by "fairness and justice," and given that nothing in the cases remotely implies that it is for the legislative or executive branches to decide that fairness and justice under the Constitution have been achieved, the only logical conclusion is that the courts decide when the legislature has acted in a manner consistent with fairness and justice.

It is hard, if not impossible, to justify the minimal review afforded by the Court of the constitutionality of whether a use is a "public use" when one compares that to the significant level of review afforded of whether compensation is "just compensation"—let alone the level of review provided by the courts in the protection of other fundamental constitutional rights. Unfortunately, the role currently allowed by the Court to examine the constitutionality of public use determinations is so narrow as to constitute virtually no role.[69] How can this negligible role square with the concept of fairness and justice? It cannot.

The federal courts cannot abdicate the important role of reviewing the actions of the legislature (or, especially, private redevelopment corporations) whenever important federal constitutional rights are at stake. In order to guarantee that fairness and justice play a role in all cases under the Takings Clause—as the Court has stated on many occasions—then it is logical that the Court should allow a thorough judicial review of the legislative body's determination that a use meets the constitutional requirements for a public use. That is not to say that the courts should make "public use determinations," only that the courts ought to carefully review the legislative determination to ensure that it meets the requirements of the Constitution. The only way that the courts can ensure that there has been fairness and justice is for the courts to play an active role in reviewing the determinations of legislatures and private redevelopment corporations.

Contract Clause Analogy

To achieve fairness and justice when a court is reviewing a taking of a nonblighted property by the exercise of eminent domain for economic development, a reduced standard of deference should be applied by the courts to the review of any legislative determination that the taking is for a public use and in the public interest. The exercise of police power has an outer limit, though the Court has observed that the factually intensive nature of such cases makes it "fruitless" to attempt to define that limit.[70] Nonetheless, the Court should acknowledge, as it has with cases under the Contract Clause,[71] that blind deference to legislative determinations of public purpose is not always appropriate.

Under the Contract Clause, the Court has held, "[as] is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure."[72] A different standard applies, however, when the sovereign is itself a contracting party:

> When the State is a party to the contract, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake."[73]

As in cases where the state itself is a contracting party, the state has a significant economic self-interest that is at stake when the state is proposing to take nonblighted, economically viable and productive land for the purpose of economic development. Under this circumstance a less deferential standard of review ought to apply.

In *Berman*, the Court essentially declined to exercise any analysis of the taking at issue, stating that, "[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."[74] Such complete deference to legislative determinations involving nonblighted properties must end. In *Berman*, the one property at issue was not blighted but was in an area to be condemned in which the majority of properties were "beyond repair,"[75] and the character of the area was such that the Court said the following:

> Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.[76]

That case was decided in 1954, at the vanguard of the movement to redevelop blighted property in order to create clean, safe public housing.

---

68. Andrus v. Allard, 444 U.S. 51, 65, 9 ELR 20791 (1979).

69. The Court's deference to the legislature's statement of purpose and motive call to mind its admonition:

> In [the dissent's] view, even with respect to regulations that deprive an owner of all developmental or economically beneficial land uses, *the test for required compensation is whether the legislature has recited a harm-preventing justification for its action. Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff*. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations.

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1025 n.12, 22 ELR 21104 (1992) (emphasis added) (citation omitted).

70. Berman v. Parker, 348 U.S. 26, 32 (1954).

71. U.S. Const. art. I, §10, cl. 1.

72. Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 412-13 (1983) (quoting U.S. Trust Co. v. New Jersey, 431 U.S. 1, 22-23 (1977)).

73. *Energy Reserves*, 459 U.S. at 412-13 n.14 (citing *U.S. Trust Co.*, 431 U.S. at 26).

74. *Berman*, 348 U.S. at 32.

75. *Id*. at 30.

76. *Id*. at 32-33.

Copyright © 2005 Environmental Law Institute®, Washington, DC. reprinted with permission from ELR®, http://www.eli.org, 1-800-433-5120.

Today, the interests of the state in the taking of nonblighted property for economic development are not, in the main, in preventing the spread of "disease, crime, and immorality," but in increasing the tax base and providing jobs, as in *Kelo*. The interests of the state in takings like the one at issue in *Kelo* are more analogous to those in Contract Clause cases, where the interest of the state is purely financial. The more stringent standard of review applied in such cases under the Contract Clause was first articulated in *U.S. Trust Co. v. New Jersey*,[77] which harkened back to those cases involving the federal abrogation of gold clauses in 1935 in which the Court drew a distinction and applied a dual standard of review:

> There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers.[78]

Similarly, there is a clear distinction between the taking of property for economic or other development that is blighted, an "ugly sore" suffocating the spirit and "reducing the people who live there to the status of cattle,"[79] and the taking of property comprised of middle class neighborhoods with proud property owners who happen to be in the path of desirable developable land along waterfront targeted for upscale redevelopment, as in *Kelo*.

Proposed Test

A reduced standard of deference, similar to that owed to the state in Contract Clause cases in which the state is a party should be applied to takings of nonblighted property for economic development. The test under the Contract Clause is whether the law or regulation at issue has in fact "operated as a substantial impairment of a contractual relationship"; if so, whether the state has a "significant and legitimate public purpose" behind the law or regulation; and finally, if there is a significant and legitimate public purpose, whether the "adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption."[80]

The test that should be applied in the condemnation context should be first for the court to determine whether the property to be taken is blighted. If the court determines the property is not blighted, then it ought to decide whether the proposed economic development or other justification for the taking amounts to a significant and legitimate *public* purpose. Finally, if the court determines that there is a significant and legitimate public purpose, it should then decide whether the scope of the taking is appropriate, i.e., whether the taking is or ought to be an easement, fee, or some other interest in land. By utilizing a less-deferential standard, the court will reasonably protect the constitutional rights of property owners. Such a test would infuse "fairness and justice" into a system in which this standard has been lacking for 50 years.

Conclusion

A ruling on *Kelo* may have a significant impact on governmental bodies, landowners, and developers. Briefing and oral argument will take place in the winter and spring of 2004-2005. It is not expected, however, that the Court will issue a ruling in this case until spring of 2005.

77. 431 U.S. 1, 26 n.25 (1977).
78. Perry v. United States, 294 U.S. 330, 350-51 (1935).
79. *Berman*, 348 U.S. at 32.
80. Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411-12 (1983) (internal quotation marks and citations omitted).